

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

10,744

FILE: B-193759 DATE: July 12, 1979

MATTER OF: Saft America, Inc.

DLG  
02/20

**DIGEST:**

[Protest that procurement was improperly restricted to two firms] is denied where procurement was negotiated pursuant to 10 U.S.C. § 2304(a) (16), which authorizes negotiated awards to firms whose availability as a mobilization base is necessary in case of national emergency and record indicates protester could not qualify its product in time to meet agency delivery requirements.

Saft America, Inc. (Saft) protests the award of contracts on a restricted basis to Fourdee, Division of Emerson Electric Company (Fourdee) and G.F. Fedon and Company (Fedon) by U.S. Army Redstone Arsenal for 1727 TOW Battery Assemblies and option quantities.

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AGC 20492

The protester contends that it is a qualified producer of the battery assembly and questions the Army's decision to restrict this procurement to Fourdee and Fedon in light of the field failures experienced with their products. In addition, the protester believes that Fourdee and Fedon are essentially a single company since "they use the same management" and obtain component cells from the same supplier. Saft, therefore, contests both the Army's assertion that only two sources produce the battery assembly and the Army's belief that it is maintaining two independent sources through awards to Fourdee and Fedon. The protester argues an award to it of a portion of this procurement will better serve the purpose of 10 U.S.C. § 2304(a)(16) to provide for a mobilization base in case of a national emergency. The Army relies on this negotiation authority for restricting the procurement.

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Under 10 U.S.C. § 2304(a)(16) contracts may be negotiated as an exception to the rules of formal advertising in those instances where the Secretary (or his designee) determines the following:

"\* \* \*it is in the interest of national defense to have a plant, mine, or other facility or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research and development would otherwise be subserved."

The use of this negotiation authority must be supported by a Determination and Findings (D&F) signed by the Secretary, Under-Secretary or any Assistant Secretary of the Military Department. Defense Acquisition Regulation (DAR) §§ 3-302(vi) and 1-201.15.

The D&F and a lengthy justification statement which supports it indicate that Fourdee and Fedon have been the previous suppliers for the batteries, that the Army expended considerable effort in assisting Fourdee to establish a production capability, that Fedon at that time was a division of Fourdee but later became independent, that mobilization base requirements mandate that both firms maintain their production capacity without a break, that the Army also does not have an adequate technical data package that by itself could be used for production of acceptable batteries, that it would take a new producer 18 to 24 months to make initial delivery (as opposed to the four to five month lead time expected of Fourdee and Fedon), and that consequently no other firm could meet the Army's delivery requirements.

The protester has not provided convincing evidence that the Army's position is unreasonable. Although there have been field failures with previously supplied units, the record indicates that the Army has worked closely with Fourdee and Fedon to remedy the problem and has modified the applicable specification accordingly.

We do not believe these failures therefore should preclude the Army from continuing to regard Fourdee and Fedon as viable producers for its mobilization base. Moreover, as indicated, Fedon, although once a division of Fourdee, is now an independent company and in that independent capacity supplied these battery assemblies to the Army under a prior contract.

With respect to Saft's belief that it is qualified to produce the battery assemblies, the record shows that the protester's production experience is based on a technical data package which it obtained from Emerson Electric Company in 1975. Since that time, several significant changes have been made to the technical data package. The Army reports that in view of the magnitude of the changes in the technical data package since 1975, the protester would be required to furnish a first article sample produced to the requirements of the revised technical data package. Government testing of the first article sample would be necessary before production of the item could begin. In view of the tight delivery schedule for this item, the Army concludes there is insufficient time for this process. Although Saft argues that it could furnish a first article quickly and meet the Army's delivery schedule without difficulty, it has not, on this record, demonstrated that the Army's position is incorrect. In this regard, the need for testing and the time involved in connection therewith is generally a matter within the competence of the procuring agency, and the agency's position will not be disturbed in the absence of clear evidence indicating the position is unreasonable. Aeronautical Instrument and Radio Company, B-190920, October 13, 1978, 78-2 CPD 219.

Saft also questions the Army's waiver of first article testing for Fourdee and Fedon. Since, as we conclude, Saft was properly excluded from this competition, it was not prejudiced by those waivers. In any event, we have consistently held that waiver of first article testing is a matter of administrative discretion which will not be questioned unless there is a clear showing that the waiver was arbitrary or capricious. See Homexx International Corporation, B-192034, September 22, 1978, 78-2 CPD 219. In light of the history

of these battery assemblies--the field failures of the units supplied under the previous specifications followed by the Army's close work with the two firms and the resulting specification change--we do not believe that the waivers were arbitrary or capricious.

The protest is denied. However, we are pointing out to the Secretary of the Army that in our view the negotiation authority of 10 U.S.C. § 2304(a)(16) does not, as a matter of course, justify a procurement restricted to one or two firms when it appears that the immediate and mobilization-base requirements can be met by other suppliers. See 48 Comp. Gen. 199 (1968). In this regard, while we believe the Army properly excluded Saft from participating in this procurement, we note that the Army has indicated its interest in having Saft qualify its product for future procurements. This is consistent with the statutory mandate for competition where practicable.

  
Deputy Comptroller General  
of the United States